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No. 08-261 (2)

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

WALTER JAMES FEHNEL, JR.,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Does Petitioner raise a matter meriting review by this Honorable Court where the Pennsylvania Superior Court found Petitioner's issue waived for failure to comply with state appellate procedural rules, specifically finding that Petitioner's statement of the challenged issue was vague because Petitioner did not specify the basis of the constitutional challenge or even the section of a constitution offended?

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CASES:

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Commonwealth v. Segida, ___ Pa. Super ___, 912 A.2d 841 (2006) 4

STATUTE:

28 U.S.C. §1257 1

RULE:

Pennsylvania Rule of Appellate Procedure (Pa.R.A.P.) 1925(b) 3, 4

STATEMENT OF JURISDICTION

On March 20, 2008, the Pennsylvania Supreme Court denied the petition for allowance of appeal filed by Petitioner. Said order constituted a final order and invokes jurisdiction of this Honorable Court pursuant to 28 U.S.C. §1257.

COUNTER-STATEMENT OF THE CASE

On October 3, 2004, police stopped Petitioner's automobile at a roadblock set up to test the sobriety of drivers of vehicles passing through the area. Police identified Petitioner as the driver, observed Petitioner had bloodshot, glassy eyes and slightly slurred speech, and detected a strong odor of alcohol emanating from Petitioner's vehicle. Police removed Petitioner from his vehicle and requested Petitioner to perform several field sobriety tests, which Petitioner failed. Police promptly transported Petitioner to a local hospital for a blood alcohol content test, which confirmed Petitioner's blood alcohol level was .208. On a subsequent date, police charged Petitioner with driving under the influence of alcohol.

Prior to Petitioner's trial, Petitioner filed a lengthy pre-trial motion challenging the constitutionality of Pennsylvania's driving under the influence laws and seeking suppression of all evidence obtained by the Commonwealth. Upon request of the Commonwealth, the trial court ordered Petitioner to clarify his pre-trial issues. Petitioner responded by

raising eleven issues including whether the roadblock in question violated Petitioner's rights under the Pennsylvania and United States Constitutions.

The trial court held a two day pre-trial hearing where Petitioner cross-examined a public safety official who coordinated the implementation of the roadblock. The public safety official relied on statistical data of alcohol-related crashes to predetermine the date, time, and location of the roadblock. The public safety official attended the roadblock to brief police on Pennsylvania law regarding roadblocks and ensure physical compliance with the law. In addition to the testimony of the public safety official, two police officers testified to the factual basis underlying Petitioner's arrest.

On or about January 20, 2006, the parties agreed that the trial court would determine Petitioner's guilt upon review of the record created at the pre-trial hearing. The trial court found Defendant guilty under Pennsylvania's *per se* driving under the influence of alcohol law, which prohibits an individual from having a blood alcohol content of .16 or greater within two hours of driving a motor vehicle. The trial court did not address Petitioner's constitutional arguments. On March 27, 2006, the trial court sentenced Petitioner to a six-month period of intermediate punishment, including forty-five days of county incarceration, ninety days of house arrest, and the balance to be served under county probation supervision.

Petitioner filed a timely notice of appeal. The Superior Court of Pennsylvania affirmed the trial court's judgment of sentence. The Pennsylvania Supreme Court denied Petitioner's petition for allowance of appeal. Petitioner's petition for writ of certiorari is the basis of the instant action.

REASONS FOR OPPOSING WRIT OF CERTIORARI

This Honorable Court should not grant Petitioner's writ of certiorari because Petitioner did not preserve the issue he seeks for review. The Superior Court found that Petitioner waived all constitutional challenges because Petitioner failed to comply with the Pennsylvania rules of appellate procedure. Federal courts should not disturb the discretion of a state court where the state court denies relief for failure to comply with a regularly-applied and well-established procedural rule.

When a state court denies relief because a party failed to comply with a regularly-applied and well-established procedural rule, a federal court will not consider that issue. *Ford v. Georgia*, 498 U.S. 411, 423-424, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991). Pennsylvania rules of appellate procedure require, upon order of the trial court, that the appealing party serve on the trial judge a concise statement of the matters complained of on the appeal no later than 14 days after entry of such order. Pa.R.A.P. 1925(b).

Failure to comply with this rule may result in waiver of issues. *Id.* The Pennsylvania Superior Court has ruled that a 1925(b) statement that challenges the constitutionality of a statute without specifying any particular basis for the challenge and without setting forth what provisions of which constitution the state allegedly offends is a vague statement. *Commonwealth v. Segida*, ___ Pa. Super ___, 912 A.2d 841, 844 (2006).

The Pennsylvania Superior Court found that Petitioner waived all constitutional issues because Petitioner filed a vague 1925(b) statement. B-10, B-11. The Superior Court's finding was supported by the record. Petitioner filed a timely 1925(b) statement alleging, in part,

> Whether the roadblock conducted at which Defendant was stopped and the Statutes, including but not limited to Section 3802 of the Pennsylvania Motor Vehicle Code and 6308 of the Motor Vehicle Code authorizing roadblocks and police checkpoints are unconstitutional as violate of the Constitutions of the United States and the Commonwealth of Pennsylvania.

The Superior Court found this statement vague because it did not specify the basis of the constitutional challenge or even the section of a constitution offended. Applying *Segida*, the Superior Court held Petitioner's vague statement violated Pa.R.A.P. 1925(b), resulting in waiver of all constitutional claims.

The Commonwealth requests this Honorable Court apply the general rule discussed in *Ford* and deny Petitioner's petition for writ of certiorari. Pennsylvania's rules of appellate procedure are regularly-applied and well-established. Petitioner's failure to comply with the rules prohibited the Pennsylvania appellate courts from addressing Defendant's constitutional claim. The Commonwealth requests that this Honorable Court not allow Petitioner to challenge issues that were not properly preserved before the Pennsylvania Courts.

CONCLUSION

For all the foregoing reasons, the Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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